

Gas City, Ltd.  
d/b/a Gas City Pantry  
2884 North US Road 421 & I-94  
Michigan City, IN 46360

DL46-19843  
District 1

## **PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **I.**

#### **BACKGROUND OF THE CASE**

The Applicant, Gas City, Ltd., d/b/a Gas City Pantry (Applicant), 2884 North U.S. Road 421 & I-94, Michigan City, LaPorte County, Indiana, filed its application for a Type-116 Alcohol and Tobacco Commission (ATC) permit, permit #DL46-19843, on or about May 8, 2002. Said application was assigned for investigation and review by the LaPorte County Local Board (LB) and said LB heard the application on or about August 1, 2002, and voted by a 3-1 margin to deny this application. The Applicant presented testimony in favor of the approval of the application by Larry Dinsmore, District Manager, Joellen Jostes, Manager of the Applicant, and Roberta Burgdorf, Manager of the Comfort Inn located in Michigan City, Indiana. Bruce Gear, a remonstrator, testified against the application at the LB hearing. The ATC voted to adopt the recommendation of the LB at its regular public meeting on August 6, 2002.

The Applicant, at that time and now, represented by Stephen M. Brenman, filed a timely notice of appeal and the matter was set before ATC Hearing Judge Daniel M. Steiner (HJ) on December 18, 2002. At that time, witnesses were sworn, evidence was heard and the matter was taken under advisement. The HJ now submits his proposed findings of fact and conclusions of law for recommendation to the ATC for its consideration, based on the LB hearing and the ATC appeal hearing.

### **II.**

#### **EVIDENCE AT THE HEARING** **WITNESSES**

The following witnesses were sworn and provided testimony at the appeal hearing:

1. Joellen Jostes ("Jostes"), Manager, testified in favor of the application.
2. Megan R. Pritchard ("Pritchard") testified that she is a certified Paralegal and is employed by the Law Offices of Stephen M. Brenman, P.C., and personally

conducted the measurements and prepared exhibits submitted into evidence by the Applicant.

3. John B. Livengood ("Livengood"), President, Indiana Association of Beverage Retailers, appeared on behalf of Bruce Gear ("Gear"), a remonstrator at the LB hearing and an ATC permit holder, who testified against the application.

III.  
EVIDENCE AT THE HEARING  
TANGIBLE PHYSICAL EVIDENCE

The following tangible physical evidence was admitted into evidence by the Applicant at both the LB and appeal hearings:

1. Brochure submitted to the ATC on or about August 2, 2002. (Exhibit #1)
2. Appellate Argument (in 29 parts), inclusive of cases and case citations. (Exhibit #2)
3. Transcript of Proceedings before the Alcoholic Beverage Board of LaPorte County, Indiana.
4. Affidavit/Statement of Officer Sara Bewley, Indiana State Excise Department. (Exhibit #3)
5. Standards for Review of Local Board Recommendation by Indiana Alcohol & Tobacco Commission (*Ind. Code* § 7.1-3-19-11). (Chart) (Exhibit #4)
6. Factors to Consider (Exhibit Board #1)
7. Courts Cases/Due Process. (Exhibit Board #2)
8. Beer & Wine Grocery Permits in Indiana. (Chart)
9. Beer & Wine Grocery Permits issued to Convenience Stores in Indiana. (Chart)
10. Beer & Wine Grocery Permits issued to Gas City, Ltd., in Indiana. (6) (Chart)
11. Photographs of Applicant at Current and Other Locations. (Chart) (Exhibit Board #3, Exhibit Board #4 and Exhibit Board #6)
12. Beer & Wine Grocery Permits issued to Gas City, Ltd., in Illinois. (14) (Chart)
13. Petitions in Favor (Residential) (284 signatures, 120 signatories in LaPorte County). (Chart)
14. Petitions in Favor (Business) (30 signatories of surrounding businesses). (Chart)

15. Character of Business Test. (Chart) (Exhibit Board #11)
16. Convenience Store/Grocery Memberships. (Chart)
  - (a) National Association of Convenience Stores.
  - (b) Illinois Retail Grocers Association.
  - (c) Indiana Retail Grocers Association.
17. Food Inventory on Hand. (Chart)
18. Reputation for Decency/Law Obedience (Letter/Certification from ATC). (Letter/Chart) (Exhibit Board #5)
19. Plat of Land Usage (Commercial Territory). (Chart) (Exhibit Board #7)
20. Nearest Grocery/Alcoholic Beverage Outlet. (Chart) (Exhibit Board #8)
21. Building and Leasehold Improvement Costs. (Chart) (Exhibit Board #9)
22. Grocery Item Inventory. (Chart) (Exhibit Board #10)
23. Grocery Items (Exhibit Board #12)
24. Comparisons to National Averages. (Chart) (Exhibit Board #13)
25. Customer Count (Estimated). (Chart) (Exhibit Board #14)
26. Annual Gross Profit Margins - Food/Fuel. (Chart) (Exhibit Board #15)
27. Beer & Wine Grocery/Convenience Store Permits Authorized & Issued in LaPorte County, Indiana. (Chart) (Exhibit Board #16)
28. Beer & Wine Grocery/Convenience Store Permits Issued in LaPorte County, Indiana. (Chart) (Exhibit Board #17)
29. Equal Protection Argument. (Exhibit Board #18)

The following tangible physical evidence was admitted into evidence by Gear, through Livengood, at the appeal hearing:

1. Photographs.
2. An affidavit of Gear, submitted after the hearing on 12-20-02, with a copy on 12-23-02.

IV.  
PROPOSED FINDINGS OF FACT

1. The Applicant, Gas City, Ltd., d/b/a Gas City Pantry, 2884 North U.S. Road 421 & I-94, Michigan City, LaPorte County, Indiana, is an Applicant for an ATC Type-116 permit, permit #DL46-19843. (ATC file)
2. Gear, a remonstrator, appeared and testified at the LB hearing and by Livengood at the ATC appeal hearing; however, the testimony of Gear and Livengood is not compelling and by Gears' own acknowledgment is the testimony of a competitor of this Applicant. (ATC file and ATC appeal hearing)
3. There was no evidence that the Applicant herein is not qualified to hold the permit applied for, nor is there any reason to deny this permit at this particular location. (ATC file and ATC appeal hearing)
4. At the LB hearing, Gene Parrett, president of the LB, testified that as a member of the LB for the last past twelve (12) years the LB had not approved of one (1) permit to a gas station and saw no reason to approve the application based upon the long-standing policy of the LB in denying such applications; however, it was established at both the LB hearing and the ATC appeal hearing that other such permits have been issued to grocery stores that sell gasoline in LaPorte County, Indiana by the ATC and that, in accordance with a determination by the Attorney General of the State of Indiana, the fact that a grocery store sells gasoline is not a legally justifiable reason for denying an alcoholic beverage permit. (ATC file, ATC appeal hearing, Transcript of LB hearing and evidence submitted at LB hearing and ATC appeal hearing)
5. That the sale of gasoline is not inconsistent with the sale of food and the issue of gas pumps is not a proper matter to consider when voting on a grocery store application. (Transcript of LB hearing, ATC appeal hearing, ATC file and evidence submitted at both the LB hearing and the ATC appeal hearing)
6. Gear and Livengood stated that they feel that the Applicant does not qualify as a grocery store, and that the Applicant would be a competitor of Gear's business and thereby detrimental to his business; however, increased competition is not a compelling reason to deny an application; and the Applicant submitted substantial evidence that it does qualify, under the "character of business" and other tests, as a grocery store. (LB hearing, ATC appeal hearing, ATC file and evidence submitted at LB hearing and ATC appeal hearing)
7. At both the LB hearing and ATC appeal hearing attorney Stephen M. Brenman submitted evidence of numerous grocery store permits issued by the ATC to convenience stores that sell gasoline in Indiana, four (4) Beer & Wine Grocery permits issued to convenience stores that sell gasoline in LaPorte County, Indiana, six (6) Beer & Wine Grocery permits issued to the Applicant in the State of Indiana,

and fourteen (14) Beer & Wine Grocery permits issued to the Applicant in the State of Illinois. (LB hearing, evidence submitted at LB hearing and ATC appeal hearing)

8. At both the LB hearing and the ATC appeal hearing attorney Stephen M. Brenman submitted Petitions requesting the approval of the application signed by 284 persons and 30 businesses. These Petitions addressed the need, desire and positive impact approval of the application would be on the neighborhood, community and other businesses. (LB hearing, ATC appeal hearing, and evidence submitted at LB hearing and ATC appeal hearing)
9. Jostes testified and attorney Stephen M. Brenman made the statement at both hearings that, in satisfaction of the "character of business test", the Applicant held a license to sell eggs, sell fresh fruit, vegetables, meat, cereals, grains, dairy products, household goods, utensils, spices, cooking flour, and oils. Jostes further testified and attorney Stephen M. Brenman made the further statement that the Applicant has average monthly taxable food sales of approximately \$58,000.00, annual taxable food sales of approximately \$696,000.00, non-taxable monthly food sales of approximately \$20,000.00, non-taxable annual food sales of approximately \$240,000.00, total monthly food sales of approximately \$78,000.00, and total annual food sales of approximately \$936,000.00. Jostes further testified that the Applicant held memberships in the National Association of Convenient Stores, the Illinois Retail Grocers Association, and the Indiana Retail Grocers Association.

Jostes further testified that the Applicant maintained annual non-taxable food inventory on hand of approximately \$144,000.00, and annual taxable food inventory on hand of approximately \$384,000.00.
10. Attorney Stephen M. Brenman submitted a Plat of Land Usage establishing that the Applicant is not located in a "residential district" and that 95% of the territory within the measured circle is commercial. (LB hearing, ATC appeal hearing, and evidence submitted at LB hearing and ATC appeal hearing)
11. That in establishing a "need" for the services of the Applicant at the proposed location attorney Stephen M. Brenman submitted a map showing the distance from the Applicants' proposed location to the nearest grocery or convenience store holding a beer and wine permit and that these distances ranged from a near distance of 1.8 miles to a far distance of 8.3 miles.
12. Jostes testified that the Applicant has spent approximately \$319,250.00, or 8.3% of its total cost, on fuel operations, and \$3,530,750.00, or 91.7%, on the building and leasehold improvement costs for its convenience store. Jostes further identified an exhibit of the Applicant's inventory of grocery items which, with the exception of fresh meats, virtually equated to the inventory of such items maintained by all convenience stores and by most grocery stores or supermarkets. (LB hearing and ATC appeal hearing)

13. Jostes testified that approximately 84% of its total customer count were food customers and that only 16% of its customer count represented fuel customers, and that approximately 49% of its total gross profit was derived from the sale of food. (LB hearing and ATC appeal hearing)
14. The Applicant has submitted substantial evidence that it does qualify for an ATC Type-116 permit.

V.  
CONCLUSIONS OF LAW

1. The Applicant, Gas City, Ltd., d/b/a Gas City Pantry, 2884 North U.S. Road 421 & I-94, Michigan City, LaPorte County, Indiana, is the Applicant for a Type-116 permit, permit #DL46-19843. (ATC file)
2. The LB denied this application without any substantial evidence or legal basis to deny this application and without any documentary or other evidence that would support a finding that this permit should not be issued. (LB hearing)
3. That the statements of Gear and Livengood were not compelling and do not constitute substantial evidence that this application should not be granted. (LB hearing and ATC appeal hearing)
4. That the LB primarily denied this application because the Applicant sells gasoline, which is not a legally justifiable reason for denying the application. (LB hearing)
5. That the Applicant has submitted substantial evidence that it, in fact, is qualified to hold an ATC Type-116 permit and that there is virtually no support of the general population in the area against the issuance of this permit, that there is substantial evidence of support of this dealer permit by the general population in the area who are in favor of the issuance of this permit, and the evidence is with the Applicant and against the remonstrator. (LB hearing and ATC appeal hearing)
6. That the initial finding of the LB was: (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (b) contrary to a constitutional right, power, privilege, or immunity; (c) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; (d) without observance of procedure required by law; or (e) unsupported by substantial evidence. (*Ind. Code* § 7.1-3-19-11) And for the reason that there was no compelling substantial evidence against the issuance of this permit at either the LB hearing or the ATC appeal hearing, for the HJ to deny this application would not be supported by substantial evidence.

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that the finding of the LB to deny this application was not based on substantial evidence and must fail. And it is further ordered, adjudged, and decreed that the evidence adduced at the ATC appeal hearing was in favor of

the Applicant and against the remonstrator and the LB and the appeal of Gas City, Ltd., d/b/a Gas City Pantry, 2884 North U.S. Road 421 & I-94, Michigan City, LaPorte County, Indiana, for this Type-116 permit, permit #DL46-19843, is granted and the permit applied for is hereby granted.

Date \_\_\_\_\_

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Daniel M. Steiner, Hearing Judge